

DM 01-142

SUPERIOR EXCAVATING, INC.

**Hearing on Violation of Underground Utility
Damage Prevention Program**

Order Finding DigSafe Violation

O R D E R N O. 23,803

October 11, 2001

APPEARANCES: Mr. Andrew Yianakopolos on behalf of Superior Excavating, Inc.; Christopher S. Aronson, Esq. on behalf of EnergyNorth Natural Gas Inc., d/b/a KeySpan Energy Delivery New England; and Marcia A. B. Thunberg, Esq. on behalf of Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On September 13, 2000, Energy North Natural Gas Inc., d/b/a KeySpan Energy Delivery New England (KeySpan) in accordance with NHPUC Chapter Puc 800 Underground Utility Damage Prevention Program, N. H. Admin. Rules, Puc 807.01, reported damage to underground facilities at the intersection of Union Avenue and High Street in Pembroke, New Hampshire. The report alleged that on August 2, 2000, Superior Excavating, Inc. (Superior) severed a 3/4" plastic temporary gas line while smoothing a municipal road using a backdragging technique with heavy equipment.

On January 19, 2001, the Safety Division, pursuant to Puc 806.02, issued a Notice of Probable Violation (NOPV)

No. 00103, referencing RSA 374:55, V, relating to damage to marked facilities, by certified mail, to Superior Excavating, Inc. Superior Excavating, Inc. responded with a letter dated February 7, 2001, requesting an informal conference. The conference was held on June 28, 2001, at the Commission offices.

The Safety Division, pursuant to Puc 806.04, issued a Notice of Violation (NOV) No. 00130V on July 2, 2001, by certified mail, assessing a fine of three hundred dollars (\$300.00).

On July 9, 2001, pursuant to Puc 806.05(a)(2), Superior Excavating, Inc. filed a request in writing for a hearing before the Commission. On July 25, 2001, Superior submitted a separate request for a prehearing conference. The parties held a settlement conference on August 16, 2001, and were unable to reach agreement on all of the issues.

A hearing was held October 1, 2001 whereupon Superior, KeySpan, and Staff presented their evidence.

II. POSITION OF THE PARTIES AND STAFF

A. KeySpan

Witnesses for KeySpan testified KeySpan learned of the Pembroke High Street construction project only when a Dig Safe ticket was pulled for the job. KeySpan was not provided

final plans of the project but worked off of plans Superior had in determining where to move their lines. KeySpan testified they would rather move their lines and install temporary lines in an effort to keep the gas lines out of harm's way. They testified the temporary gas line was installed three feet below grade. KeySpan also installed a tracer wire below the temporary line and a guide tape above the temporary line. KeySpan explained the tracer wire is used to locate gas lines but that it is buried a few inches below the gas line so as to avoid sparking the gas line in the event the tracer line is hit by lightning. KeySpan testified that approximately an hour before the incident, they re-located the line and marked its' location with two foot long dashes and "G" for gas as well as with arrows indicating its direction. At the time KeySpan re-located the temporary line, they did not re-confirm its depth. KeySpan explained that it is not their ordinary operating procedure to confirm depths because their equipment only picks up the tracer wire signal, not the actual utility line. For this reason, they do not provide contractors with buried depths and leave confirming depths to the contractor. KeySpan also testified that they did not see any exposed guide tape.

KeySpan also provided testimony of the engineering

consultant hired by the Town of Pembroke's engineer, Keach - Nordstrom Associates, Inc., to oversee the project. The consulting engineer testified he was present at the time Superior damaged the temporary line, that he witnessed Superior using a bulldozer to blade the road. He stated Superior was not backdragging with an excavator nor was Superior adding material to the road. He testified he saw Superior's superintendent, Joe Downing dig up the temporary line, place it away from the road while Superior worked on catch basin No. 1 at the intersection of Union and High Streets. He testified Mr. Downing, re-buried the temporary line back in the road when Superior was finished with catch basin No. 1. Further, he testified that he warned Superior as they were blading up High Street to be careful not to hit the temporary gas line.

KeySpan alleged Superior moved the temporary gas line while doing road work and then returned the gas line to where they found it. Once returned to its original location, KeySpan contended Superior failed to place the line at its original three foot depth.

KeySpan submitted a summary of repair costs for the accident totaling \$680.26.

B. Superior

Superior Excavating stated they had complied with RSA 374:51 which requires 72 hour notice prior to excavating. Superior does not deny they hit the temporary gas line the day of the accident. Superior's excavator operator, Mr. Paul Werzanski, testified the accident happened while he was backdragging with the excavator, a technique used to smooth a road, at the end of the day when they were making the area passable for traffic. Mr. Werzanski testified he was operating the excavator the entire day of the accident and that he never saw Mr. Downing remove, relocate, and re-bury any gas line. Mr. Werzanski testified he wasn't watching Mr. Downing all the time but that he was certain if the gas line had been moved he would have noticed it. Superior testified they did not have a bulldozer on site the day of the accident as the consulting engineer claimed. Superior testified they had other confrontations with the consulting engineer relating to the Pembroke job.

Mr. Werzanski testified that although he did not hand locate the gas line, that he nonetheless located the gas line prior to the accident. He testified he observed the exposed portion of the gas line on the side of the road and knew its location in the road prior to him backdragging. Mr. Werzanski testified he didn't think he would hit the line

because he was adding material to the road, not excavating material.

Superior testified their standard operating procedure is to hand locate a utility prior to commencing work in the tolerance zone. Superior testified they followed this standard operating procedure with respect to another temporary gas line at the intersection of Union and High Streets.

C. Staff

Rick Marini, P.E., Administrator of the Safety Division, testified that the Underground Utility Damage Prevention Program is "depth-blind" and requires certain procedures within a tolerance zone equal to 36 inches plus the width of the underground facility, Puc 806.0, regardless of depth. Mr. Marini testified the violation warranted the imposition of fines in the amount of \$300.00, reimbursement of the cost of repair, and mandatory education.

III. COMMISSION ANALYSIS

This case came before us on a request for hearing by Superior Excavating, Inc (Superior)., from a Notice of Violation (NOV) issued on July 2, 2001 by the New Hampshire Public Utilities Commission Safety Division. In the Notice of Violation, the Safety Division alleged that Superior had damaged a 3/4 inch temporary gas by-pass line owned by Key

Span Energy Delivery New England (KeySpan) in the Town of Pembroke on August 2, 2000, while excavating, in violation of RSA 374:55, V, relating to damage to marked facilities. The NOV specifically assessed a fine of \$300.

We held an evidentiary hearing at the Commission on September 18, 2001, at which time Superior was ordered to show cause why it should not be held liable for penalties up to \$500 and cost of repairs, pursuant to RSA 374:55, V, and expenditures to collect the penalty, pursuant to RSA 374:55, VII.

At the hearing, Staff, KeySpan and Superior presented a stipulation of fact covering a number of the factual issues raised by the order to show cause. In addition, witnesses for KeySpan and Superior testified as to conflicting versions of the events of August 2, 2000, and events leading up to and taking place after the date of the incident. Essentially, Superior argued that the line was damaged because KeySpan had moved it to an unsafe location, only 3 inches or so from the surface of the roadway. A Superior employee testified that the line broke as he was back-dragging dirt over this area, to smooth out the roadway to make it passable for evening traffic after the day's construction activities.

The parties agreed in the stipulation of fact that "Superior was engaged in conduct within the statutory definition of 'excavating' contained in RSA 374:48, III" at the time the line was broken. Superior, however, denied at the hearing that the back-dragging activity constituted excavating, arguing the rubber-tired loader was only dragging and smoothing dirt added to the roadbed, not digging in to the ground.

The case hinges on whether Superior was excavating, because it is undisputed that Superior's loader blade cut through the pipe. RSA 374:48, III states in pertinent part:

"Excavate", "excavating", or "excavation" means any operation conducted in a public way...in which earth, rock, or other material in the ground is moved...or otherwise displaced by means of any ...equipment, ... and includes but is not limited to ...grading...[and] scraping..."

The backdragging technique engaged in by Superior was intended to move or displace the earth in order to fill in bumps and depressions left from the day's work, and render the roadway flat enough to be used as a driving surface. The Commission determines this activity constituted "excavation" as that term is used in RSA 374:48, III.

The statutory scheme of RSA 374:48 et. seq. provides specific remedies for damage occurring during excavating. RSA

374:55, V provides that if " marked underground facilities are damaged, the excavator shall be subject to the penalties in paragraph VIII and liable for the cost of repairs for the damage." RSA 374:55, VIII provides in pertinent part that any "excavator ... that does not comply with [the statute] shall be required either to complete a 'Dig Safe' training program, or to pay a civil penalty of up to \$500..."

There is no dispute that KeySpan marked the facilities the day of Superior's road-smoothing work. While there is some dispute as to whether these marks could still be seen at the time of the backdragging, and who located the temporary facility at a shallow depth, the Superior witness testified that he knew where the temporary gas line was located, and indeed that he in fact knew it was not buried the standard 2 to 3 feet deep. This is not a case where the damage was caused by the lack of marks. This case falls squarely within the parameters of RSA 374:55, V, damage to marked facilities.

The essence of Superior's argument is that it should not be liable for the damage because the gas line was buried at too shallow a depth. We have previously held that because underground utility mains are at various depths which may change over time for many reasons, the Underground Utility Damage Prevention Program is "depth-blind." RSA 374:55, V does not

provide an exemption from liability for penalties and costs for damage to marked facilities based on how deep or shallow the facilities are at the location. The statute does not distinguish between cases where a facility is placed at a dangerously shallow depth by the operator as opposed to the excavator. In either case, the legislature has left it up to the excavator to avoid damaging marked facilities.

This is not to say we will not take reasonableness into account when damage occurs to marked underground facilities. In Order No. 21,312 in Docket DE 94-085 we considered the reasonableness of the excavator's actions. In that docket, we found the shallow depth of the service as placed by the utility absolved the excavator of liability where he damaged an underground utility while surface grading. The fact pattern in the instant case differs in important aspects. To summarize, in Docket DE 94-085, the excavator had successfully excavated approximately 3800 linear feet of pipe buried at a depth of 30" to 36" and, despite almost daily site visits, the utility failed to inform the excavator one section of pipe was installed at a depth significantly more shallow than the rest of the pipe. Here, we find Superior's knowledge that the temporary gas line was shallow distinguishes the present matter from DE 94-085. At the moment Superior knew the temporary gas line was shallow, it

was incumbent upon Superior to determine whether its use of heavy equipment over a line buried merely inches below the surface was reasonable. If Superior felt its backdragging activities could pose a safety risk given the shallow location of the temporary gas line, it should have requested KeySpan make the line safe for Superior's proposed activity.

Safety Division staff advocated at hearing for imposition of a mandatory Dig Safe education session. We decline to impose such a measure at this time. We believe Superior's experience of discussing this case in two informal conferences with Staff, its participation at the hearing, as well as the reading of our determination in this Order, provide sufficient remedial instruction as to Superior's responsibilities in this type of case in the future.

Based on the foregoing, it is hereby

ORDERED, that, in the matter of NOV 00130V, Superior Excavating, Inc. is liable for the penalty of \$300.00 and such penalty shall be payable to the State of New Hampshire within 30 days from the date of this Order; and it is

FURTHER ORDERED, that Superior Excavating, Inc. pay KeySpan \$680.26, within thirty days of this Order, for the cost of repairs for the damage to utility facilities referenced in NOV 00130V.

By order of the Public Utilities Commission of New Hampshire
this eleventh day of October, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary